Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STAFF SERGEANT GREGORY J. PRICE,
PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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December 1996

25 pp

QUESTION PRESENTED

Whether the Military Judge erred in denying Petitioner's motion to suppress statements induced from him by SSgt Moore, by finding that SSgt Moore, in questioning Petitioner, was not acting in an official capacity and, therefore, had no duty to inform Petitioner of his Article 31 rights under the Uniform Code of Military Justice or inform Petitioner's retained counsel that he wished to question him.

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The petitioner, Staff Sergeant Gregory J. Price, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case, issued on 6 September 1996.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at No. 95–0147, _M.J._ (6 September 1996), is located at Appendix A. The unpublished opinion of the United States Air Force Court of Criminal Appeals, *United States v. Price,* ACM 30445 (AFCMR 7 September 1994), is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on 6 September 1996. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259 (3) (West Supp. 1996) and 10 U.S.C.A. § 867(a) (West Supp. 1996).

STATEMENT OF THE CASE

On 27 July 1992, pursuant to a random inspection, petitioner provided a urinalysis sample for drug testing. The sample was sent to the laboratory at Brooks AFB, TX, and on 21 August 1992, the laboratory notified March Air Force Base officials that petitioner's urine sample had tested positive for methamphetamine. (App. Ex. IV). On 27 August 1992, Special Agent (SA) Dave Riter called petitioner to come to the Air Force Office of Special Investigations (AFOSI) to make a statement. (App. Ex. X). Petitioner was read his rights under Article 31 of the Uniform Code of Military Justice, 10 U.S.C.A. § 831 (West Supp. 1996) and told he had a right to

remain silent and a right to an attorney. After completing a statement (which was not incriminating), petitioner requested a lawyer and first saw his defense counsel on 28 August 1992. (R. 100).

SSgt Richard Moore, Jr. worked with petitioner in the pharmacy section of the 22d Medical Group, March AFB. He was petitioner's nominal subordinate and apparent friend. (R. 32–34). SSgt Moore harbored a strong opposition to drug use and a fervent desire to become an AFOSI agent. (R. 41; App. Ex. III). In early August 1992, SSgt Moore became suspicious that petitioner was using illegal drugs. He had heard rumors about such activity from a civilian named Peggy and believed that petitioner was nervous about the urinalysis test petitioner had taken on 27 July. (R. 15, 16).

Armed with his suspicions, SSgt Moore approached the AFOSI on 14 August 1992 with information about petitioner. Contact was made through his supervisor (and appellant's supervisor), SMSgt Thomas Frausto, and his first sergeant, CMSgt Van Slyke. (R. 15). At that time, no case file existed on petitioner; however, the agents instructed SSgt Moore to "see what information you can get." (R. 16, 33). From 14 August onward, the AFOSI trained, tasked, and communicated with SSgt Moore concerning petitioner and other matters. Although at some point the agents directed SSgt Moore to fill out a Declaration of Agreement and informed him that he "was not an agent," their actions (and SSgt Moore's actions) speak louder than words. (R. 29, 47).

AFOSI agents purchased lunch for SSgt Moore at an off base establishment on 14 August and met with him on 20 August, 28 August, 1 September, 16 September, and 2 October. (R. 49; App. Ex. VIII; App. Ex. IX). According to the 14 August AFOSI Form 14 at App. Ex. III, contact was to be maintained "[w]eekly or as operation dictates." SA Riter and SA Thomas D. West accomplished several additional

Form 14s concerning SSgt Moore. (R. 43; App. Ex. VIII; App. Ex. IX).

In the course of their relationship with SSgt Moore, the AFOSI agents provided him with narcotics training and tasked him to get the vehicle description and license plate of cars belonging to "Peggy" and petitioner, (R. 44); to obtain the medical records of petitioner (R. 59); and to get a prescription from petitioner. (R. 30) (this last request is disputed by SA West at R. 59). Moreover, they tasked SSgt Moore with a job unrelated to petitioner's case. (R. 59).

Although the military judge found that the AFOSI agents did not instruct SSgt Moore to question petitioner (Military Judge's Finding #28), the AFOSI agents were aware that SSgt Moore was overly enthusiastic, noting sometime after 21 August 1992, "we will have to keep the reins tight." (R. 42, 43; App. Ex. III). The record shows that they took information elicited by SSgt Moore without protest. (App. Ex. III, VII, and IX). When asked what he would do with the information elicited from petitioner, SSgt Moore replied that he would "[t]ell the OSI." (R. 19). Most importantly, after each meeting with petitioner, SSgt Moore would inform the AFOSI agents about his conversations. (R. 21, 22).

On 28 August or 2 September 1992 (most probably the earlier date), the AFOSI informed SSgt Moore that petitioner had requested an attorney and that the AFOSI could no longer talk to petitioner. (R. 18, 19). Petitioner also told SSgt Moore that he had an attorney. (R. 28). By 2 September, SSgt Price had been removed from his duty section. (R. 34). Nevertheless, SSgt Moore initiated all subsequent conversations with petitioner, (R. 28), "to see what kind of information I could gather" (R. 19). Knowing that petitioner was a suspect and had invoked his right to legal counsel, SSgt Moore approached him on 2 September, 11 September, and 16 September 1992 in an attempt to elicit incriminating

information. (R. 19, 20, and 28). SSgt Moore tried to induce statements about drugs using trickery and falsehood. SSgt Moore told petitioner that he had taken a command directed urinalysis after ingesting cocaine and asked petitioner "if he knew of anything that might flush my (SSgt Moore's) system." (R. 20–25). SSgt Moore also asked petitioner for a prescription for Fastin, a drug similar to methamphetamine. (R. 20, 21). SSgt Moore testified that AFOSI asked him to get a prescription of this drug from petitioner. (R. 23, 30).

SSgt Moore testified on the merits of the case about his conversations with petitioner. Petitioner's primary defense was that the drug Fastin may have caused a positive urinalysis reading for methamphetamine. However, SSgt Moore testified that petitioner said "I got my dates together" in relation to the Fastin. (R. 207). The government theorized that petitioner obtained a Fastin prescription from a diet clinic in order to create a defense to the charge against him. Furthermore, the government used the discussions initiated by SSgt Moore about flushing agents, specifically herbal tea, to further cast doubt on petitioner's credibility. (R. 383–385).

In her findings of fact and conclusions of law on the motion to suppress, the military judge ruled that SSgt Moore was a person subject to the Uniform Code of Military Justice and that he suspected petitioner of drug use. Although the judge stated that SSgt Moore, "clearly went beyond his tasking," she ruled that he was not acting in an official capacity. The military judge ruled that SSgt Moore was required neither to give petitioner Article 31 rights nor to notify petitioner's counsel of his desire to interrogate petitioner. (R. 85).

On 7 September 1994, the Air Force Court of Military Review (now United States Air Force Court of Criminal Appeals but for purposes of this Brief will be referred to by its former name) affirmed the findings of guilty and the sentence

in an unpublished opinion. *United States v. Price,* ACM 30445, (AFCMR 7 September 1994). (Appendix). On 6 September 1996, the Court of Appeals for the Armed Forces likewise affirmed.

REASON FOR GRANTING THE WRIT

THE MILITARY JUDGE ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS STATEMENTS INDUCED FROM HIM BY SSGT MOORE, WHEN IT FOUND THAT SSGT MOORE, IN QUESTIONING PETITIONER, WAS NOT ACTING IN AN OFFICIAL CAPACITY AND, THEREFORE, HAD NO DUTY TO INFORM PETITIONER OF HIS ARTICLE 31 RIGHTS UNDER THE UNIFORM CODE OF MILITARY JUSTICE OR TO INFORM PETITIONER'S COUNSEL BEFORE AGAIN QUESTIONING PETITIONER.

In accordance with *United States v. Goode,* 32 M.J. 105, 108 (CMA 1991), a "servicemember is entitled to this rights advice [under Article 31] only if he is a suspect at the time of the questioning and the questioning itself is part of an official law enforcement investigation or disciplinary inquiry."

The first prong of the test enunciated in *Goode* concerns the definition of officiality. In *United States v. Duga,* 10 M.J. 206 (CMA 1981), the Court of Appeals for the Armed Forces (then named the Court of Military Appeals) separated the test of officiality into two parts:

> Accordingly, in each case it is necessary to determine whether (1) a questioner subject to the Code was acting in an official capacity in his inquiry or only had a personal motivation; and (2)

> whether the person questioned perceived that the inquiry involved more than a casual conversation.

Duga, 10 M.J. at 210. Nonetheless, this rule has, at times, been modified. *United States v. Loukas,* 29 M.J. 385 (C.M.A. 1990) (second prong of *Duga* test met when questioner had superior rank or authority over the suspect). All the facts and circumstances determine the *Duga* test for officiality. *Goode,* 32 M.J. 108.

The Court of Appeals for the Armed Forces found no error, even assuming, arguendo, the first prong of the *Duga* test was met, because petitioner could not have perceived that the questioning by SSgt Moore, a friend and nominal subordinate of petitioner, was anything other than a casual inquiry. Therefore, there was no indication that petitioner was coerced by some superior or disciplinary authority into implicating himself. Although this finding meets the *Duga* two prong test, petitioner asks this Honorable Court to grant writ of certiori in order to determine whether *Duga* should be overruled in order to give Article 31 of the UCMJ its proper meaning and effect—to protect the greater rights afforded servicemembers under the Uniform Code of Military Justice—when a military servicemember, in accordance with the Article 31 rights provided to him or her, requests an attorney and no longer wishes to be questioned under Article 31.

Conclusion

SSgt Moore was acting in a sufficiently official capacity when he questioned petitioner three times after being told that petitioner had an attorney. SSgt Moore questioned petitioner solely to obtain a confession from him that he intended to (and did) report to AFOSI. He did not question petitioner for any personal reason. The actions of the AFOSI officials after they told SSgt Moore that they could no longer

question petitioner clearly show that SSgt Moore was not acting for personal reasons with no direction from AFOSI. AFOSI, upon learning that SSgt Moore was questioning petitioner, allowed the questioning to continue, had lunch with SSgt Moore, and willingly received reports from SSgt Moore on what petitioner had told him. In order to give Article 31 its proper meaning and effect, the perception on the part of a servicemember that such questioning was "casual" as opposed to "official" is irrelevant and the second prong of the *Duga* test should be overruled.

WHEREFORE, petitioner respectfully requests that this writ of certiori be granted.

Respectfully submitted,

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December 1996

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APPENDIX A

UNITED STATES, Appellee

v.

Gregory J. PRICE, Staff Sergeant
U.S. Air Force, Appellant

No. 95–0147

CMR No. 30445

UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

Argued: November 2, 1995

Decided: Sep. 06, 1996

Counsel

For Appellant: *Captain Michael L. McIntyre* (argued); *Colonel Jay L. Cohen* (on brief); *Lieutenant Colonel Joseph L. Heimann.*

For Appellee: *Major Jane M.E. Peterson* (argued); *Colonel Jeffery T. Infelise* (on brief); *Lieutenant Colonel Michael J. Breslin.*

Military Judge: Martha Bower

Opinion of the Court

COX, Chief Judge:

Appellant was tried by general court–martial with members[1] at March Air Force Base, California. Contrary to his pleas, he was found guilty[2] of wrongful use of methamphetamine, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. He was sentenced to a bad–conduct discharge, confinement for 6 months, and reduction to pay grade E–4. The convening authority approved the sentence. The Court of Military Review[3] affirmed.

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[1]Before the court below, appellate defense counsel stated that this case was tried by judge alone. The Government "accepted" this statement. The opinion below correctly stated in its very first word that this was a trial by members.

In its supplement and its final brief, appellate defense counsel stated this case was tried by judge alone. The Government again "accepted" this statement in its letter answer and its Answer to Final Brief.

The record reflects that the PRES announced the findings (R.414) and the sentence (R.450).

Counsel are reminded that the purpose of pleadings is to assist the Court. Accuracy in *every* respect is an essential aspect of a helpful brief. The existence of patent errors significantly diminishes the effectiveness of the brief. One purpose of an adversary proceeding is to prevent inaccurate or misleading statements from being before this Court.

[2]The military judge instructed the members that there was no need to vote on the Charge, regardless of the vote on the specification. (R.413) This is contrary to RCM 921(c)(1) and (c)(6), Manual for Courts–Martial, United States (1995 ed.). Those provisions have not been changed since 1984.

Military judges are not free to pick and choose which of the President's procedural rules to follow.

[3]*See* 41 MJ 213, 229 n.* (1994)

We granted review of the following issue:

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED IN FINDING THAT SSGT MOORE WAS NOT ACTING IN AN OFFICIAL CAPACITY WHEN HE QUESTIONED APPELLANT AND THAT THEREFORE STATEMENTS INDUCED FROM APPELLANT BY SSGT MOORE WITHOUT THE READING OF ARTICLE 31 RIGHTS OR NOTIFICATION OF APPELLANT'S DEFENSE COUNSEL, WERE INADMISSIBLE.

We hold that the military judge did not err in denying the defense motion to suppress.

After taking evidence and prior to ruling on the defense motion, the military judge made extensive findings of fact and her findings were specifically adopted by the Court of Military Review. Unpub. op at 2. Based upon our review of the record and the evidence, we, too, conclude that the military judge's findings were correct and adopt them to resolve the granted issue. *United States v. French,* 38 MJ 420 (CMA 1993); *United States v. Davis,* 36 MJ 337 (CMA 1993).

The facts, in brief, are as follows:

On July 27, 1992, appellant provided a urine sample as part of random urinalysis testing. At that time, appellant and Staff Sergeant (SSgt) Moore both worked in the pharmacy section of the 22d Medical Group at March AFB. SSgt Moore "technically worked for" appellant. "Sometime in early August 1992," SSgt Moore "heard, or was told" that appellant was "using drugs." He passed this information on to the pharmacy superintendent and later made a report to the Office of Special Investigations (OSI) when Special Agent (SA) Riter took him to lunch where they discussed SSgt

Moore's concerns about appellant's drug use. SA Riter informed SSgt Moore that they did not have an active case on appellant and that SSgt Moore's participation by providing information "was voluntary." They both signed a Declaration of Agreement that SSgt Moore was not an OSI agent, and SSgt Moore was advised "that if he committed a criminal act, the OSI would investigate" him and that he must act "as the OSI told him to do." SA Riter then asked SSgt Moore to get some details about appellant's vehicle and "to pass on" any information he got from a named civilian employee about appellant; "he did not tell" SSgt Moore "to obtain statements from" appellant. Also at this meeting, SSgt Moore expressed a desire "to become an OSI agent," and SA Riter told him what the requirements for such a job would be. Additional luncheon meetings took place between SSgt Moore and agents of the OSI, and SSgt Moore "was given some type of training concerning drugs during one" of these meetings.

Appellant's urine sample tested positive for methamphetamine. The OSI was notified of the results and they "called" appellant "in." After having been advised of his rights under Article 31, UCMJ, 10 USC § 831, appellant waived his rights and made a written statement; then he requested counsel. Appellant was "removed" from his job at the pharmacy "and assigned elsewhere."

The two OSI agents in this case testified that they "believed" they advised SSgt Moore that appellant had asked to see an attorney. Later, in September 1992, SSgt Moore had three conversations with appellant, and the statements appellant made to him during these discussions were reported to the OSI agents. Those statements were the focus of the defense motion to suppress. Trial defense counsel asserted that SSgt Moore was obligated to advise appellant of his Article 31 rights and to notify counsel of the scheduled interview. Despite the fact that the military judge found SSgt

Moore's testimony about these conversations to be unclear and "confusing," she found that they were "casual" exchanges between co–workers. After the last of the three meetings, SSgt Moore indicated to the OSI agents that appellant would claim that the urinalysis was positive because he was using a prescription drug. One of the OSI agents then asked SSgt Moore to "check" appellant's medical records to see if that was the case. The military judge found that the agents never "instruct[ed] SSgt Moore to initiate any conversations with" or interrogations of appellant and that they did not "provide him questions to ask" appellant. She further found that SSgt Moore was motivated by "his dislike of drugs in the military" and "his very strong desire to become an OSI agent"; however, his "conversations with" appellant "were informal and outside the scope of any military relationship."

On the basis of the foregoing facts, the military judge ruled that SSgt Moore "was a person subject to" the Uniform Code of Military Justice who "suspected" that appellant was wrongfully using drugs. But she further concluded that SSgt Moore had not been "acting in an official law enforcement or disciplinary capacity"; that "a reasonable man" in appellant's "position would not perceive" that SSgt Moore "was acting in an official law enforcement or disciplinary capacity"; SSgt Moore "was not required to advise" appellant "of his rights under Article 31(b)"; and that SSgt Moore had no obligation to notify counsel. We agree.

Appellant clearly was suspected of using drugs by SSgt Moore, a person subject to the UCMJ, when the two engaged in the three conversations that gave rise to the defense motion to suppress. *See United States v. Good,* 32 MJ 105, 108–09 (CMA 1991). However, standing alone, that fact does

not invoke the warning requirements of Article 31(b).[4] Rather, as this Court held in *United States v. Duga,* 10 MJ 206, 210 (1981):

> Therefore, in light of Article 31(b)'s purpose and its legislative history, the Article applies only to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry. *United States v. Gibson,* [3 USCMA 746, 14 CMR 164 (1954)]. Accordingly, in each case it is necessary to determine whether (1) a questioner subject to the Code was acting in an official capacity in his inquiry or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation. *United States v. Gibson, supra.* Unless both prerequisites are met, Article 31(b) does not apply.

See also United States v. Loukas, 29 MJ 385 (CMA 1990).

We recently examined this two–pronged test for the rights'–advisement requirement of Article 31(b) in *United States v. Harvey,* 37 MJ 140 (1993). There we held that the requirement was not triggered where a military member

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[4]Article 31(b), Uniform Code of Military Justice, 10 USC § 831(b), provides the following:

> (b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(O'Brien), acting as an agent for the OSI, agreed to use a hidden transmitter to allow law enforcement officials to monitor his conversations with Harvey. Holding that the accused's Fifth and Sixth Amendment rights to counsel and Article 31 warnings had not been violated, we observed the following:

> In this case O'Brien was subject to the Code and was acting as an agent of the OSI. But both meetings were requested and arranged by appellant who was O'Brien's supervisor and would not have been perceived as an inquiry by an individual acting in an official capacity or as a law enforcement official to obtain a confession from a suspect. As in *Gibson*, this questioning created neither a coercive atmosphere nor an atmosphere where appellant thought she was required to cooperate. *See also United States v. Kirby*, 8 MJ 8 (CMA 1979).

37 MJ at 143–44.

In the present case there are fewer factors warranting a conclusion that warnings were required than there were in *Harvey*. The operative in *Harvey* was clearly acting as an agent for law enforcement officials; and therefore, in an official capacity. Here the military judge found that SSgt Moore was not so acting and that he went beyond what he was asked to do by the law enforcement officials. Even assuming arguendo that some specter of officiality had been imprinted on SSgt Moore's actions, the second prong of *United States v. Duga, supra*, clearly was not present in this case. It was appellant who was SSgt Moore's technical supervisor, not the other way around; the conversations were casual and took place in a work environment; there was no evidence that appellant was aware of SSgt Moore's involvement with the OSI; and the encounters between

appellant and SSgt Moore took place under circumstances which gave no indication that appellant was coerced by some superior or disciplinary authority.[5] Thus, we hold that there was no violation of appellant's rights under Article 31, UCMJ, 10 USC § 831.

Turning to the obligation to notify counsel, we note that the military judge, apparently relying on the version of Mil.R.Evid. 305(e), Manual for Courts–Martial, United States, 1984, in existence at the time of trial (amended effective December 9, 1994), held that no duty to notify defense counsel existed "[s]ince Article 31(b) rights were not required." We likewise hold that no such notice was required. We note, however, that in *United States v. Harvey, supra,* the Court addressed the question of the possible implications of an accused's rights to counsel under the Fifth and Sixth Amendments, after he had requested and consulted with counsel, when the person who elicited the incriminating responses was acting in an official capacity. Here we have upheld the military judge's holding that SSgt Moore was not acting in an official capacity, so such an inquiry would not be required. However, again assuming *arguendo* that there was a specter of officiality, we note that the conversations took place prior to preferral of the charge, so there was no Sixth Amendment right involved in this case. *United States v. Wattenbarger,* 21 MJ 41 (CMA 1985). Furthermore, appellant was not in custody during the period in question. Therefore, there was no violation of appellant's Fifth Amendment right to counsel.

The concerns expressed by the Supreme Court in

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[5]We note that the military judge applied a reasonable–person standard in resolving this issue, relying on *United States v. Good,* 32 MJ 105, 108 n.2 (CMA 1991). However, in view of the evidence in this case, we need not now decide if a subjective standard is more appropriate.

Massiah v. United States, 377 U.S. 201, 84 S.Ct 1199, 12 L.Ed.2d 246 (1964); and *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); and this Court in *United States v. Applewhite,* 23 MJ 196 (1987); and *United States v. McOmber,* 1 MJ 380 (1976), simply are not pertinent to this case. *United States v. Harvey, supra; see generally United States v. LeMasters,* 39 MJ 490 (CMA 1994).

The decision of the United States Air Force Court of Military Review is affirmed.

Judges SULLIVAN, CRAWFORD, and GIERKE, and Senior Judge EVERETT concur.

APPENDIX B

UNITED STATES

v.

Staff Sergeant GREGORY J. PRICE, FR565–06–6476
United States Air Force

ACM 30446

7 September 1994

Sentence adjudged 11 December 1992 by GCM convened at March Air Force Base, California. Military Judge: Martha Bower.

Approved sentence: Bad–conduct discharge, confinement for 6 months, and reduction to E–4.

Appellate Counsel for Appellant: Colonel Terry J. Woodhouse, Colonel Jay L. Cohen, Captain Del Grissom, and Captain Joel R. Reifman.

Appellate Counsel for the United States: Colonel Jeffery T. Infelise and Captain Jane M.E. Peterson.

Before

HEIMBURG, SCHREIER, and GAMBOA
Appellate Military Judges

OPINION OF THE COURT

SCHREIER, Judge:

Members convicted appellant contrary to his pleas of a single use of methamphetamine. The approved sentence is a bad–conduct discharge, confinement for 6 months, and reduction to E–4. Appellant argues the military judge erred in admitting appellant's statements to a co–worker who was applying information to the Air Force Office of Special Investigations (AFOSI). Finding no prejudicial error, we affirm.

On 27 July, appellant was selected for a random urinalysis which tested positive for methamphetamine. Several weeks later, SSgt M, a co–worker, went to AFOSI to report rumors about appellant's drug use. He also indicated he wanted to become an AFOSI agent. AFOSI did not have an active case on appellant, but told SSgt M to "see what information you can get." Over the next month, AFOSI asked him to obtain a description of appellant's vehicle, to check appellant's medical records, and to obtain information on other individuals who might be involved with he was not an agent. Appellate defense counsel urge that the facts of this case are similar to *United States v. Johnstone,* 5 M.J. 744 (A.F.C.M.R. 1978). In *Johnstone,* this Court found that the informant's inquiries were official when the AFOSI directed him to go to the suspect's room, look for stolen property, ask questions, and report back to them. The key factor in the *Johnstone* case was the informant's use of questions propounded by the AFOSI. Here, the AFOSI taskings were far more general in nature and never directed at personal contact with appellant. Additionally, the fact that SSgt M lied about his personal use of drugs does not make the inquiry official or create a coercive environment. *See United States v. Hinkson,* 17 U.S.C.M.A. 126, 37 C.M.R. 390 (1967). We find that SSgt M's actions were not official but were motivated by his dislike of drugs and personal desire to become an AFOSI agent.

We have also applied the facts of this case to the second prong of *Duga* concerning the perceptions of the person being questioned. The circumstances of these conversations, including their informal nature at the workplace among co–workers, support the military judge's conclusion that there was not a coercive environment where appellant believed he was compelled to answer questions. *See United States v. Harvey*, 37 M.J. 140 (C.M.A. 1993). Therefore, neither prong of the *Duga* test was met and there was no requirement to advise appellant of his Article 31 rights.

Appellant also alleges that SSgt M was required to contact appellant's counsel prior to questioning him. Appellant argues that otherwise the AFOSI could circumvent the counsel notification requirements of Mil.R.Evid. 305(e) by using informants. We have previously found that SSgt M was not required to advise appellant of his Article 31 rights. Therefore, the requirements of Mil.R.Evid. 305(e) do not apply to him.

Finally, we observe that the statements in question were not critical to the finding of guilty. Trial counsel introduced evidence showing an unbroken chain of custody and laboratory findings. Although appellant denied any knowing use of methamphetamine, he indicated the positive result may have been the result of either his prescribed use of Fastin or an inadvertent ingestion of methamphetamine. The government expert, Dr. Jain, explained why Fastin would not produce the same laboratory readings. There was no evidence to support an inadvertent ingestion. We find overwhelming evidence to support the findings of guilty apart from the statements of appellant to SSgt M.

We conclude that the findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantial rights of the accused occurred. Accordingly, the findings of guilty and the sentence are

AFFIRMED.

Senior Judge HEIMBURG and Judge GAMBOA concur.

OFFICIAL

LAURA L. GREEN
Clerk of Court
Air Force Court of Military Review